

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of )  
)  
Petition for Reconsideration of the )  
Request for Review of the )  
Decision of the )  
Universal Service Administrator by )  
)  
Mercer County School District ) File No. SLD-160177  
Princeton, West Virginia )  
)  
Federal-State Joint Board on ) CC Docket No. 96-45 ✓  
Universal Service )  
)  
Changes to the Board of Directors of the ) CC Docket No. 97-21  
National Exchange Carrier Association, Inc. )

**ORDER ON RECONSIDERATION**

**Adopted: November 28, 2001**

**Released: November 29, 2001**

By the Common Carrier Bureau:

1. Before the Common Carrier Bureau (Bureau) is a Petition for Reconsideration filed by Mercer County School District (Mercer County), Princeton, West Virginia.<sup>1</sup> Mercer County seeks reconsideration of our denial of its request for review of the decision of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator).<sup>2</sup> For the reasons set forth below, the petition is dismissed.

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections.<sup>3</sup>

<sup>1</sup> *Petition for Reconsideration of Request for Review of the Decision of the Universal Service Administrator by Mercer County School District*, File No. SLD-160177, CC Dockets No. 96-45 and 97-21, Petition for Reconsideration, filed May 16, 2001 (Petition for Reconsideration).

<sup>2</sup> *Request for Review by Mercer County School District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-160177, CC Dockets No. 96-45 and 97-21, Order, DA 01-854 (Com. Car. Bur. rel. April 17, 2001) (*Request for Review by Mercer County*). Parties may seek reconsideration from a final action of the Commission or its designated authority pursuant to 47 C.F.R. § 1.106.

<sup>3</sup> 47 C.F.R. §§ 54.502, 54.503.

The Commission's rules require that the applicant make a bona fide request for services by filing with the Administrator an FCC Form 470, which is posted to the Administrator's website for all potential competing service providers to review and bid upon.<sup>4</sup> After the FCC Form 470 is posted, the applicant must wait at least 28 days before entering an agreement for services and submitting an FCC Form 471, which requests support for eligible services.<sup>5</sup> SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules.<sup>6</sup>

3. The Commission's rules further provide, however, that eligible schools and libraries with pre-existing contracts are exempt from the competitive bidding requirement under certain circumstances. In relevant part, section 54.511(c)(1) exempts contracts entered into on or prior to July 10, 1997 from competitive bidding requirements for the duration of the contract.<sup>7</sup> In such a case, the service request need not be subjected to competitive bidding. However, the existing contract must have been reported on an FCC Form 470 either in the year of the funding request or in a prior funding year.<sup>8</sup> The applicant's FCC Form 471 must demonstrate compliance with the competitive bidding rules by specifying, for each funding request, the FCC Form 470 in which the contract was either posted for competitive bidding or reported as a pre-existing contract.<sup>9</sup>

4. In our previous decision, we upheld SLD's denial of several of Mercer County's Funding Year 3 funding requests for discounts under the schools and libraries universal service

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<sup>4</sup> Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470); 47 C.F.R. § 54.504(b); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9078, para. 575 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service First Report and Order* in part and reversing and remanding on unrelated grounds), *cert. denied, Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. denied, AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed, GTE Service Corp. v. FCC*, 121 S. Ct. 423 (Nov. 2, 2000); *see also* SLD Website, <<http://www.sl.universalservice.org>>.

<sup>5</sup> 47 C.F.R. § 54.504(b), (c); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 471).

<sup>6</sup> *Request for Review by Metropolitan School District of Pike Township, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-120821, CC Dockets No. 96-45 and 97-21, Order, 15 FCC Rcd 13891, para. 2 (Com. Car. Bur. 2000).

<sup>7</sup> 47 C.F.R. § 54.511(c)(1). *See Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5441, para. 217 (1997) (*Fourth Order on Reconsideration*).

<sup>8</sup> *See* SLD Website, Reference, Frequently Asked Questions, <<http://www.sl.universalservice.org/reference/faq.asp#1>>.

<sup>9</sup> Instructions for Completing the Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (FCC Form 471) (September 1999) (Form 471 Instructions), at 19.

support mechanism.<sup>10</sup> We held that SLD, based on the record before it, reasonably concluded that Mercer County's funding requests were not supported by an FCC Form 470 as required by Commission regulations.<sup>11</sup> Mercer County argued that the services requested were all based on pre-existing contracts, that an applicant could post such contracts in an FCC Form 470 in one year and rely on this posting in following years, and that its requests were supported by such a prior posting.<sup>12</sup> Mercer County specifically asserted that the contracts had been posted in FCC Form 470 No. 798200000009067, a Funding Year 1 FCC Form 470 (Year 1 Form 470).<sup>13</sup> The Year 1 Form 470 listed a number of pre-existing contracts, including, Mercer County alleged, the contracts underlying its Funding Year 3 requests.<sup>14</sup> However, we concluded that SLD reasonably found that the requests were not based on pre-existing contracts, because each specified a contract award date of April 11, 1998, which would disqualify the contract as a "pre-existing contract" under Commission regulations.<sup>15</sup>

5. Mercer County alternately asserted that the requests were supported by FCC Form 470 No. 126210000284078 (Year 3 Form 470), which was posted on December 20, 1999 and presented a number of services for competitive bidding.<sup>16</sup> We concluded, however, that the Year 3 Form 470 could not have presented the relevant services for bidding because the service contracts were awarded prior to the posting date of the Year 3 Form 470.<sup>17</sup>

6. In its Petition for Reconsideration, Mercer County now asserts that both of our conclusions were erroneous and unreasonable.<sup>18</sup> With regard to our conclusion that SLD reasonably rejected the Year 1 Form 470, Mercer County finds error with our decision in allegedly looking to "an allowable contract date of '04/11/1998' . . . [as] evidence that Mercer's contracts were . . . not preexisting."<sup>19</sup> Mercer County argues that the allowable contract date is generated by SLD, not the applicant, and therefore, our reliance on this date is unreasonable.<sup>20</sup> Mercer County's argument precedes from a false characterization of our decision, however. We

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<sup>10</sup> *Request for Review by Mercer County*, at para. 1.

<sup>11</sup> *Id.* at para. 7.

<sup>12</sup> *Id.* at paras. 5-6.

<sup>13</sup> *Id.*; FCC Form 470, West Virginia Department of Education, Year 1, Universal Serv. Control No. 798200000009067 (Year 1 Form 470).

<sup>14</sup> *Request for Review by Mercer County*, at para 6.

<sup>15</sup> *Id.* at para. 7.

<sup>16</sup> *Id.* at para. 9; FCC Form 470, Mercer County School District, Year 3, App. No. 126210000284078, filed December 20, 1999 (Year 3 Form 470).

<sup>17</sup> *Request for Review by Mercer County*, at para. 9.

<sup>18</sup> Petition for Reconsideration, at 2-3.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.*

relied not on the allowable contract date but on the contract award date, which is specified by the applicant, not SLD, and indicates “the date your contract for this service was awarded.”<sup>21</sup> Because the applicant specified April 11, 1998 as the date the contract was awarded, we see no error in concluding that SLD reasonably found the contracts not to have been awarded on or prior to July 10, 1997.

7. Mercer County asserts that our reliance on the contract award date in rejecting the Year 3 Form 470 was unreasonable because, Mercer County alleges, the Year 3 Form 470 requested tariff services, not contractual services.<sup>22</sup> In fact, the Year 3 Form 470 requested both.<sup>23</sup> However, we construe Mercer County’s underlying assertion to be that the funding requests in its FCC Form 471 were themselves for tariffed services, and that the contract award dates are therefore irrelevant. This argument fails at the outset on procedural grounds. Mercer County did not mention its new assertion in its request for review, and a party may not base a petition for reconsideration on new facts that were available to it at the time of its original request for review.<sup>24</sup>

8. Even were we to consider Mercer County’s assertion that its funding requests are for tariffed services, we would still deny its Petition for Reconsideration, because nothing in the record before SLD gave any indication that the relevant requests were for tariffed services. In the FCC Form 471, each funding request clearly indicated that it was pursuant to a contract, not a tariff.<sup>25</sup> When an applicant seeks support for a tariffed service, the FCC Form 471 instructions specify that the applicant, in filling out the appropriate section of the FCC Form 471, should enter a “T” for the contract number, and leave the contract award date and contract expiration date fields blank.<sup>26</sup> For each of the relevant requests, Mercer County specified a specific contract number, not a “T,” and gave a contract award date and a contract expiration date.<sup>27</sup>

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<sup>21</sup> *Request for Review by Mercer County*, at para. 7; Form 471 Instructions, at 21, Item 18.

<sup>22</sup> Petition for Reconsideration, at 3.

<sup>23</sup> Year 3 Form 470, at 2 (requested services included “tariffed services,” “month-to-month services,” and “services for which a new written contract is sought . . .”). Generally, an applicant must have a contract or other binding agreement for all services for which support is requested; however, telecommunications services purchased at rates specified in a tariff do not need to be supported by a contract. Form 471 Instructions, at 19.

<sup>24</sup> See Letter from Nathaniel Hawthorne, Esq., on behalf of Mercer County School District, to Federal Communications Commission, filed June 7, 2000, at 2-3 (characterizing requests as based on “multi-year contracts” and asserting that “a pre-existing contract governs this matter”); *Keith Maydak v. AT&T Communications*, File No. E-95-39, 14 FCC Rcd 6680, para. 7 (Com. Car. Bur. 1999) (“Section 1.106(b)(2) of the Commission’s rules permits the consideration of later-supplied evidence [on a petition for reconsideration] only if the petition can show that this evidence is based on facts that were unavailable or unknown to petitioner until after his last opportunity to present such material.”)

<sup>25</sup> FCC Form 471, Mercer County School District, filed January 17, 2000, at 5-11.

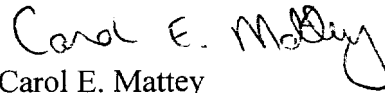
<sup>26</sup> Form 471 Instructions, at 20-21.

<sup>27</sup> *Id.*

Thus, Mercer County's assertion that its requests were for tariffed services would not in any case provide a basis for reconsideration.

9. ACCORDINGLY, IT IS ORDERED, pursuant to section 1.106(j) of the Commission's rules, 47 C.F.R. § 1.106(j), that the Petition for Reconsideration filed by Mercer County School District, Princeton, West Virginia on May 16, 2001 is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION



Carol E. Matthey  
Deputy Chief, Common Carrier Bureau